Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-394

UNITED STATES OF AMERICA,
Petitioner,

VERSUS

L. O. WARD, d/b/a
L. O. WARD OIL AND GAS OPERATIONS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1979

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OPINION BELOW

The citations to the opinions in the United States Court of Appeals and the District Court contained in the Petition for Writ of Certiorari are accurate.

JURISDICTION

The statement of jurisdiction contained in the Petition is accurate.

QUESTION PRESENTED

The question presented is accurately and succinctly stated in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition accurately and adequately sets forth the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

The statement of the controlling facts set forth in the Petition is accurate and fair.

REASONS WHY THE PETITION FOR WRIT SHOULD BE DENIED

The United States urges the Court to grant certiorari because (1) the Court of Appeals judgment "could disrupt significantly the administration and enforcement of the Federal Water Pollution Control Act" (Petition, pg. 12) We disagree for reasons set forth below; (2) the Tenth Circuit's holding that a proceeding to assess a civil penalty in this case is a "criminal case" for purposes of the Fifth Amendment privilege against self-incrimination is inconsistent with prior decisions of this Court because (a) "when Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the Courts have taken Congress at its word" (omitting citations) (Petition, pg. 17), and (b) the civil penalties provided by the Act in question "are remedial, not punitive, under this analysis"; (3) there is an alleged conflict among the Circuits in that other Circuits have held that the proceeding is not "criminal" for purposes of the statutory immunity provision in Section 311(b)(5) which was designed to protect the Fifth Amendment privilege. These cases are distinguishable on their facts.

1. Significantly, the Government's first reason advanced for granting the Petition is not that the decision is in conflict or inconsistent with decisions of this Court or is in conflict with other opinions from different Circuits. The only empirical evidence to support the conclusion that the Court of Appeals decision "could disrupt significantly the administration and enforcement of the Federal Water Pollution Control Act" is a reference to "a sample of 100 civil penalty cases in each of the 12 Coast Guard Districts" which revealed "an idividual owner or operator in almost a fifth of the cases" where spills were reported. The citation for the authority of this study is not given, and we do not know whether the sample is fair or representative or under what circumstances it was made. Indeed, the administrator authority, or publication of the sample is not annotated or referenced. Conceding, however, the validity of the sample, this would mean that of the 14,741 discharges which the Government contends were made in 1978, only approximately 1,400 of these civil penalty cases were against individual owners and operators. Thus, the Court of Appeals decision would affect slightly less than ten pencent (10%) of all civil penalty cases.

It is suggested in the Petition that "the Tenth Circuit's holding could induce increased litigation because of the possibility that civil penalty liability could be avoided altogether if the Government could not establish an independent source of information about the discharge" (Petition, pg. 13, fn. 9). This opinion is not supported by any authority. Indeed, the contrary appears more plausible. It is unlikely that the average individual owner and/or operator would incur the expense of litigation to challenge the

Coast Guard's proposed assessment when the cost of the fine is likely to be substantially less than the cost of litigation. Moreover, there is another consideration which is evident from even this case; any serious spill of "harmful quantities" is likely to be seen and observed by others who will report it even if the owner or operator does not. In fact, that is exactly what happened here. Two days after the spill, "a sanitarian with the Oklahoma Department of Health on a routine inspection of a land fill near Ward's property observed that oil had seeped from the retention pit, down a gulley, and into Boggie Creek (citations of the record omitted), a tributary of the Arkansas River System" (Petition, pg. 7). The record does not disclose whether the sanitarian or the Oklahoma Department of Health reported the spill to the Coast Guard or the EPA. If either had done so, then the first notification to the Coast Guard or EPA would have come from an individual other than the owner or operator, and in those circumstances, under the ruling of the Court of Appeals, the Government could have proved its case of the spill and imposed its fine independently of the first notification by the owner/operator. Moreover, there may be compelling reasons why an owner-operator would resist the self-reporting feature: he may have intentionally or inadvertently delayed the report. Indeed, the Petition suggests that is exactly what happened here. In those rare or remote instances (probably attributable in the beginning to ignorance of the law or of the law's mandate), the number of independent operators who would challenge the imposition of the fine drastically reduces itself.

Even assuming the Petition's summary of the sample is correct, somewhere between 75% to 90% of the spills

would not be affected by the Court's decision because they involve spills by corporations which do not have the Fifth Amendment privilege against self-incrimination. Therefore, the Court of Appeals decision does not "disrupt significantly the administration and enforcement of the Federal Water Pollution Control Act." We do, of course, recognize that it may present problems of administration for the remaining small percentage of individual owners or operators who will assert their Fifth Amendment privilege against self-incrimination, and to that extent it will prove difficult to enforce the law. However, those individuals are likely to be owners or operators who have sustained only small spills for the reasons set forth above.

It has long been recognized that the Fifth Amendment privilege may inhibit certain legitimate functions but "the immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." *United States* v. *White,* 322 U.S. 694, at 698.

2. The second argument advanced for granting the writ is that the decision is inconsistent with prior decisions of this Court because this Court "has viewed the question whether a given proceeding is criminal for purposes of constitutional protection as one of statutory interpretation (omitting citations)" (Petition, pg. 17), and "when Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the Courts have taken Congress at its word. *United States* v. *J. B. Williams Company,* 498 F.2d 414, at 421 (2d Cir. 1974)" (Petition, pg. 17). The Government suggests that this certainly should be the case "if the measure of

recovery is not so excessive so as to transform what was intended to be a civil penalty into a criminal penalty" (Petition, pg. 17). With respect to the last statement, we need only note that the Coast Guard can assess a fine up to $5,000.00 for each offense at the time in question under the provisions of Section 311(b)(6), and as the Petition itself notes in footnote 2, this has been amended to provide for a civil penalty up to $50,000.00 and under some circumstances as high as $250,000.00, all denominated "civil" penalties. In view of that statutory language, we are puzzled at the Petition's suggestion that the statutory "measure of recovery is not so excessive as to transform what was intended to be a civil penalty into a criminal penalty" (Petition, pg. 17). One need only observe that there are few substantive criminal offenses that carry penalties for a single offense as high as $50,000.00 let alone $250,000.00.

With respect to the argument that the congressional characterization of the penalty as civil should be controlling, the Court of Appeals gave due weight to this argument, but it realized that the use of the label "civil penalty" does not automatically determine that Ward is to be denied his constitutional guarantees. The Court reasoned that the Government could not be allowed to circumvent constitutionally guaranteed rights afforded to citizens and impose penalties upon them, simply by labeling a penalty "civil" and providing for administrative collection or enforcement. The description of the penalty is entitled to be given weight, but it is not controlling. *Trop* v. *Dulles*, 356 U.S. 86 at 94-95 (1958); *United States* v. *LaFranca*, 282 U.S. 568 (1931); *United States* v. *Constantine*, 296 U.S. 287 (1935). This is so even if the only penalty sought to be

extracted is a monetary one. *United States* v. *Constantine*, supra. Indeed, as we demonstrate below, the fact that it is a monetary penalty to be extracted is not the sole determinative factor.

The Court of Appeals treated the problem before it as one of statutory construction applying the rule of *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). It is obvious from a reading of the Court of Appeals' opinion that its entire emphasis and orientation was towards resolution of statutory interpretation and construction, applying the criteria laid down in *Kennedy* v. *Mendoza-Martinez*, supra, and in this connection appeared to place great weight on the fact that the sanction involved here appears excessive "in relation to the alternative purposes assigned" (Petition, pg. 16a). The Court of Appeals held, "However, we believe that the factors employed in determining the amount of the penalty indicate a punitive nature. Imposition of penalties even in situations where the discharge is accidental, non-negligent and non-intentional could be excessive. This is especially so, when the operator, in good faith, attempts to clean up, and in fact does clean up the discharge on his own initiative. Inasmuch as the amount of the penalty is correlated to the size of the business involved, a large business concern may well be heavily penalized despite the lack of fault . . . Commandant Instruction 5922.11(a), supra. In such a situation, the imposition of a large penalty would be excessive. Thus, we conclude that this indicator leans in favor of the penal nature of the Act" (Petition, pg. 17a).

It is clear that the Court of Appeals undertook an analysis based upon an interpretation and construction of the statutes:

> "In undertaking our assessment of the statutory provisions here in question, we must analyze (i) the congressional intent discernable from the face of the statute, (ii) the enforcement mechanism of the statute, and (iii) the indicators of congressional intent enumerated by the Supreme Court in *Kennedy* v. *Martinez*, supra." (Petition, pg. 7a)

3. The third asserted reason for granting the Petition is that the court's decision "is also inconsistent with the conclusions reached by a number of courts that such a proceeding is not 'criminal' for purposes of the statutory immunity provisions in Section 311(b)(5) which was designed to protect the Fifth Amendment privilege." In making this assertion, the Petitioner relies upon *United States* v. *Allied Towing Corporation*, 578 F.2d 978 (4th Cir. 1978); *United States* v. *LeBouf Brothers Towing Company*, 537 F.2d 149 (5th Cir. 1976), *cert. den.* 430 U.S. 987 (1977); *Apex Oil Company* v. *United States*, 530 F.2d 1293 note 7 (8th Cir. 1976), *cert. den.* 429 U.S. 827 (1977); *United States* v. *Atlantic Richfield Company*, 429 F.Supp. 830 (E.D. Pa. 1977), aff'd *sub. nom.*, *United States* v. *Gulf Oil Company*, 573 F.2d 1303 (3rd Cir. 1978). It is stretching the point, however, to say that the opinion below is "inconsistent" with those cases.

First, Petitioner recognizes that the cases upon which it relied involved corporate defendants and that "there were expressions in several of the opinions that a closer scrutiny may be warranted in the case of an individual defendant (citations omitted)."

Secondly, the alleged inconsistency is more superficial than real because in each of the cases relied upon to establish the insufficiency, the owner-operator was a corporation which could not invoke the Fifth Amendment privilege against self-incrimination, but was arguing that because it had reported the spill, it was therefore entitled to take advantage of that portion of the statute that provides a form of statutory immunity prohibiting information contained in the notification of the spill from being "used against any such person in any criminal case . . ." Section 311(b)(5).

In each of the cases relied upon in the Petition to establish the alleged inconsistency among the Circuits, the corporations had claimed that the civil penalty provisions of the Act were in reality criminal cases within the meaning of Section 311(b)(5) and therefore the notification granted them a form of use immunity, *LeBouf Brothers*, supra, at 151. In those cases, and *LeBouf Brothers* is typical, the analysis of the Court of Appeals did not turn upon statutory construction of the "civil penalties" but rather upon the fact that "defendants cannot claim a pertinent constitutional protection, the issue is purely one of statutory construction, and Appellees are foreclosed by the clear statutory wording." *LeBouf Brothers*, pg. 152. The Court in *LeBouf Brothers* also recognized, "the normal rule that statutory grants of immunity should be interpreted strictly (citations omitted) *LeBouf Brothers*, supra, 152 fn. 11.

This alleged inconsistency can be reconciled quite easily. Section 311(b)(6) is a "criminal statute" for purposes of the Fifth Amendment, but not for purposes of granting use immunity to a corporation in a criminal prose-

cution. It is well recognized by decisions of this Court that a statute may be criminal or quasi-criminal for purposes of the protection of the Fifth Amendment self-incrimination clause even though it may not be criminal in relation to other portions of the Bill of Rights. This is the teaching of *Boyd* v. *United States,* 116 U.S. 616 (1886); reaffirmed in *United States* v. *United States Coin & Currency,* 401 U.S. 715 (1971). The actual and historical application of the "quasi-criminal" doctrine of *Boyd* shows that it refers not to the kind of penalty involved but to the nature or kind of particular constitutional right involved. For example, the quasi-criminal doctrine has been held to invoke the Fifth Amendment self-incrimination clause against enforcement of a civil money penalty, *Lees* v. *United States,* 150 U.S. 476 (1893), but not to invoke the Fifth Amendment double-jeopardy clause. *Helvering* v. *Mitchell,* 303 U.S. 391 (1938). With this distinction clearly in mind, the alleged inconsistency evaporates.

The court below analyzed the statute and the enforcement scheme carefully, dispassionately and critically. The court gave due weight to the fact that the penalty was denominated civil (Petition, pg. 8a), but found that the statute "on its face, tends to evidence a punitive intent" because of the "language dealing with the automatic assessment and determination of the amount of the penalty" (Petition, pg. 9a). However, the court said that this determination was not conclusive for purposes of treating it criminal in nature. It then turned to a consideration of the administrative enforcement scheme and the *Kennedy* v. *Mendoza-Martinez* indicators of congressional intent. With respect to the enforcement procedures, it found that the en-

forcement mechanism applied by the Coast Guard "clearly indicates that the assessment and determination of the amount of the penalty is based upon punitive considerations" (Petition, pg. 12a). Indeed, it would be difficult to hold otherwise in view of the plain language of the Coast Guard regulations which are cited in the body of the court's opinion (Petition, pg. 11a).

In determining congressional intent, the court isolated seven factors; (1) whether the sanction involves an affirmative disability or restraint; (2) whether historically it has been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote traditional aims of punishment — retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purposes assigned. *Kennedy,* supra, 168-169.

The Court held as follows:

1. Concerning the first indication, the court found, "It offers little indication as to Congress' intent in this instance."

2. The court held, "This indicator also gives little indication as to Congress' intent. Monetary penalties have traditionally been applied to both criminal and civil statutes" (Petition, pg. 14a).

3. With respect to scienter, the court found that the statute on its face does not contain an element of scienter, but that the factors enumerated in the statute and Com-

mandant's Instructions used in determining the amount of the penalty indicate a scienter requirement, and this factor alone with the absence of a scienter requirement in the criminal statute dealing with the imposition of criminal penalties of oil or hazardous substance indicated to the court a finding that the statute was criminal in nature (Petition, pg. 14a-15a).

4. With respect to the fourth indicator, the court said directly, "In our view, this factor lends considerable weight to a finding that the civil penalty is actually criminal in nature" (Petition, pg. 15a). This is so the court said because the statutes and administrative policies, "have the effect of retribution. The penalties are based on such factors as the gravity of the violation, the degree of culpability and the prior record of the party. The fact that a party acted in good faith, could not have avoided the discharge and, once it occurred, undertook clean-up measures immediately is to be given no consideration in relation to the 'imposition or amount of a civil penalty.'" (Petition, pg. 15a).

5. With respect to the fifth indicator, here again the court found that this was indication that the penalty was in fact criminal in nature because there is a statute criminal in nature for the identical offense (Petition, pg. 15a).

6. The court declined to employ the Government's rationale on the sixth indicator because although the penalty could be regarded as compensation, the court felt this would be true only if the factors in determining the amount thereof reasonably related to the extent of damage to the environment rather than the other considerations which indicate retribution (Petition, pg. 16a).

7. The court found that the factors employed in determining the amount of the penalty indicates a punitive intent in nature (Petition, pg. 17a).

Even if the court was wrong in its application of the *Kennedy-Mendoza-Martinez* case, the court's decision could be sustained under the holdings of *Boyd* v. *United States*, supra, *United States* v. *United States Coin & Currency*, supra, and *Helvering* v. *Mitchell*, 303 U.S. 391.

CONCLUSION

The court below fully considered and correctly decided the issues. This Court's prior decisions are controlling and in line with the Circuit Court. *Boyd*, supra, *Helvering*, supra, the allegedly conflicting decisions are distinguishable on their facts and further distinguishable by the rule of *Boyd*, supra. There is little evidence upon which to base a conclusion that the court's holding would significantly disrupt the intent of the Act.

The Petition for Writ of Certiorari should be denied, or if granted, judgment of the United States Court of Appeals for the Tenth Circuit should be sustained summarily.

Respectfully submitted,

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October, 1979

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the above and foregoing Brief in Opposition was mailed this ..... day of October, 1979, to Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing same in the United States Post Office, postage prepaid.

Stephen Jones